No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

THE REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF PROFESSORS AND PRACTITIONERS OF ARBITRATION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The *amici curiae* identified in the attached brief hereby respectfully move, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition for a Writ of Certiorari. Petitioner has consented to the filing of this brief in a Consent to File *Amici Curiae* Brief filed with this Court on August 29, 2012. Respondent did not consent.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici are professors of law and lawyers currently or previously engaged in the field of international arbitration, whose work (as counsel, arbitrators, or scholarly commentators) has included the arbitration of investment disputes under bilateral or multilateral investment treaties.[1]

The primary interest of *amici* is in the orderly operation of investment treaty arbitration, a system of international dispute resolution that has become an important component of international commerce. *Amici* believe that the decision of the United States Court of Appeals for the District of Columbia Circuit, by substituting a *de novo* interpretation of a treaty between two sovereign states for that of the arbitrators, could seriously disrupt the established system for resolving threshold issues in this type of arbitration.

The *amici* subscribing to this brief are:

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1. Pursuant to Rule 37(6), counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Consents to the filing of this brief were sought from the parties pursuant to Rule 37(3), but only Petitioner consented. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae's* intention to file this brief.

Gerald Aksen is an independent international arbitrator and the 2005 recipient of the American Bar Association Dispute Resolution Section's D'Alemberte/Raven Award for outstanding ADR service. He formerly served as General Counsel of the American Arbitration Association, President of the College of Commercial Arbitrators, Vice-Chairman of the ICC International Court of Arbitration and adjunct professor of law at New York University School of Law.

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Conrad K. Harper is a retired partner in the firm of Simpson Thacher & Bartlett LLP in New York. Mr. Harper previously served as Legal Adviser of the United States Department of State and as President of the Association of the Bar of the City of New York. He has also been a member of the Permanent Court of Arbitration at The Hague, a director of the American Arbitration Association, a member of the Council of the American Law Institute, and a member of the Council on Foreign Relations.

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Judith Kaye is Of Counsel to the firm of Skadden Arps Slate Meagher & Flom LLP in New York. For 15 years up to 2009, Judge Kaye was Chief Judge of the State of New York. She is a member of the Board of Directors of the American Arbitration Association and was formerly President of the Conference of Chief Justices and Chair of the Board of Directors of the National Center for State Courts.

Carolyn Lamm is a partner in the firm of White & Case LLP. She is a former President of the American Bar Association, former President of the D.C. Bar, a member of the Council of the American Law Institute, and a member of the Executive Committee of the Board of Directors of the American Arbitration Association.

Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law Emeritus at New York University School of Law. He served as Associate Reporter of the American Law Institute's Restatement (Third) of Foreign Relations Law and Co-Reporter of the Institute's project on Recognition and Enforcement of Foreign Judgments. Before coming to NYU, Professor Lowenfeld served as Deputy Legal Adviser of the United States Department of State.

Lawrence W. Newman is Of Counsel to the firm of Baker & McKenzie LLP in New York He is

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Daniel M. Price is an independent legal practitioner and arbitrator who was formerly a partner in the firm of Sidley Austin LLP. Mr. Price served in government as deputy agent of the United States to the Iran–U.S. Claims Tribunal, Deputy General Counsel in the Office of the U.S. Trade Representative, and Assistant to the President for International Economic Affairs. He is a member of the Board of Directors of the American Arbitration Association and a United States appointee to the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes.

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States appointees to the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes.

SUMMARY OF ARGUMENT

Both the sovereigns who enter into investment treaties and the investors who make investments in their territories depend on arbitral tribunals to resolve foreign investment disputes. Sovereigns, by signing the treaties, and investors, by bringing arbitrations under them, have chosen to submit their disputes to arbitrators selected by the parties to be impartial, independent, and competent to interpret and apply investment treaties and the principles of international law that govern them.

The system of investment treaty arbitration depends on appropriate judicial deference to arbitral decisions. The Court of Appeals' misreading of the intent of the sovereign parties as to whether courts or arbitrators should play the primary role in interpreting and applying the provisions of investment treaties, including on threshold issues of admissibility, threatens to undermine the effectiveness of this dispute resolution system. Because most investment treaties contain similar arbitration provisions, the Court of Appeals' decision could have far-reaching consequences.

Beyond investment arbitration, United States arbitration law would benefit if the Court were also to take this opportunity to clarify whether courts or arbitrators bear primary responsibility for making threshold determinations on matters, exemplified by the local remedies requirement at issue in this case,

that this Court has described as questions of "procedural arbitrability."

Accordingly, the Question Presented by the Petition for a Writ of Certiorari ("Petition") is both important and recurring.

THE PETITION PRESENTS A QUESTION OF RECURRING IMPORTANCE TO THE ENFORCEMENT OF INVESTMENT TREATIES

More than 2700 bilateral investment treaties ("BITs") are in effect today between pairs of sovereign nations; the United States is a party to no fewer than forty-seven.[2] Many multilateral treaties among nations in a particular region (such as the North American Free Trade Agreement, or NAFTA) or among nations concerned about a particular resource (such as the Energy Charter Treaty, or ECT) also contain investor-protection provisions. In addition, a worldwide regime for the resolution of investment disputes is embodied in the Washington Convention, which created the International Centre for Settlement of Investment Disputes.

The Agreement between the Government of the United Kingdom of Great Britain and Northern

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2. *See* United Nations Conference on Trade and Development, country-specific lists of BITs, available at http://archive.unctad.org/Templates/Page.asp?intItemID=2344&lang=1.

Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments ("Treaty") is an example of a BIT.[3] BITs normally identify the protections that an investor based in one sovereign party to the BIT may expect for investments made in the territory of the other sovereign party. BITs typically protect against expropriation (Article 5 of the Treaty), while giving assurances of fair and equitable treatment (Article 2), treatment no less favorable than that accorded to nationals of the host state ("national treatment") (Article 3), and treatment no less favorable than that accorded to nationals of third countries ("most-favored-nation treatment" or "MFN") (Article 3).

The characteristic mechanism through which BITs provide redress to aggrieved investors is international arbitration. BITs generally require that an investor provide notice to the host state and wait a specified period of time before commencing an arbitration. Other conditions and preconditions may be specified. But the feature that makes these treaties so essential an element of the international economic system is their guarantee that an investor who satisfies the conditions set by the treaty may assert a claim directly against the foreign state that, in the investor's view, has denied the protections promised by the treaty.

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3. U.K. Treaty Series No. 41 (1993). The English language text of the Treaty is attached to this brief as Appendix A.

The right to resort to arbitration relieves investors of the need to persuade their own governments to espouse their claims through diplomatic channels, and relieves states of the complications to diplomatic relations that arise from the espousal of private claims. It also relieves investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and the government. This right to a neutral forum is of central importance to those investing in a foreign economy. By depoliticizing investment disputes and providing aggrieved investors a neutral forum in which to bring claims directly against a foreign state, investment treaties have ushered in a new era of international investment law.

It is not uncommon—indeed, it verges on the routine[4]—for the sovereign respondent in a BIT arbitration to raise threshold objections to the jurisdiction of the tribunal or to the admissibility of the claim.[5] These objections can range from issues of

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4. Of 236 investment treaty arbitrations on public record, 197 have included objections either to the admissibility of claims or the jurisdiction of the tribunal. *See* http://italaw.com/links.htm and http://icsid.worldbank.org. Many BIT arbitrations never become public.

5. In the language of investment treaty arbitration, an objection to jurisdiction asserts that the particular *tribunal* is not competent to hear the dispute, while an objection to admissibility asserts that a particular *claim* may not be

(Footnote continued on next page)

policy[6] to compliance with technical treaty requirements concerning the definition of an investment,[7] the nationality of the investor,[8] or satisfaction of conditions precedent to arbitration.[9]

The sovereign parties to BITs typically expect such threshold objections to be ruled upon by arbitral tribunals having expertise in international law, just as these tribunals will deal with the substantive issues that arise under those treaties. Arbitrators appointed to resolve these cases are accustomed to analyzing threshold objections and to assessing their validity under the law applicable to

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(Footnote continued from prior page)

heard by the tribunal. *See* Jan Paulsson, *Jurisdiction and Admissibility*, *in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Gerald Aksen et al. eds., 2005).

6. *E.g.*, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, at ¶¶ 103-05 (Aug. 7, 2002) (environmental legislation). All of the arbitration awards cited in this brief may be found at http://italaw.com/links.htm.

7. *E.g.*, *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL, Award, at ¶¶ 97-111 (Nov. 26, 2009).

8. *E.g.*, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, at ¶¶ 25-46 (July 7, 2004).

9. *E.g.*, *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, at ¶¶ 12-21 (Oct. 24, 2011).

the treaty. In doing so, they generally give primacy to the text of the particular BIT before them, as interpreted in accordance with the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention").

Both sovereigns and investors depend on this system for adjudicating international investment disputes. Sovereigns do so to provide an incentive for foreign investment, while investors do so to obtain security against arbitrary treatment.

Awards entered in BIT arbitrations are being presented to United States courts for enforcement or review.[10] A review by this Court of the decision of the Court of Appeals in this case would contribute significantly to clarity in the law by defining the proper level of respect owed by United States courts to arbitral awards emerging from this internationally accepted system for the resolution of foreign investment disputes.

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10. *E.g., Werner Schneider v. The Kingdom of Thail.,* No. 11-1458, 2012 U.S. App. LEXIS 16508 (2d Cir. Aug. 8, 2012); *Funnekotter v. Republic of Zimb.*, No. 09-8168, 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011).

ARGUMENT

I. ARBITRAL TRIBUNALS SHOULD RESOLVE THRESHOLD ISSUES IN ARBITRATION PROCEEDINGS UNDER INVESTMENT TREATIES

The Court of Appeals concluded that the sovereign parties to the Treaty—the United Kingdom and Argentina—intended and expected that a United States court would determine *de novo* threshold questions under the investor-state arbitration provisions of the Treaty, rather than defer to the determination of such questions by arbitrators. That conclusion was not merely a misreading of the Treaty, but is also likely to set United States courts on a collision course with the international regime embodied in thousands of BITs. The Petition provides an opportunity for this Court to make clear that arbitrators' determinations of threshold questions that do not call into question the consent of the parties to engage in arbitration at some stage of proceedings are entitled to deference from the courts.

A. THE PARTIES TO THE TREATY INTENDED TO SUBMIT MATTERS OF TREATY INTERPRETATION TO THE ARBITRAL TRIBUNAL

Argentina's consent to arbitrate disputes with U.K. investors is found in Article 8 of the Treaty,

which provides for investor-state arbitration. This article leaves little room for doubt that the signatory states intended threshold issues relating to arbitration to be addressed and resolved by arbitrators appointed pursuant to the Treaty.

Article 8 provides in paragraph (1) that investor-state disputes are to be submitted to the "competent tribunal of the Contracting Party in whose territory the investment was made." It provides in paragraph (2) that such disputes "shall be submitted to international arbitration" if 18 months have elapsed after submission of the dispute to such tribunal, or after the decision of the tribunal if the dispute continues. Paragraph (3) provides that arbitration will be conducted under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, unless the parties agree to other rules. Paragraph (4) then specifies that an arbitral tribunal should decide the dispute and that its decisions are final and binding:

> **The arbitral tribunal shall decide the dispute** in accordance with the provisions of this Agreement [the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. **The arbitration decision shall**

> **be final and binding on both Parties**. (emphasis added).

International law, as embodied in the Vienna Convention, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[11] The terms of Article 8(4) express unequivocally Argentina's and the United Kingdom's intention that an international arbitral tribunal—not a court—should rule, not only on the merits of the dispute, but also on disputes over the admissibility of claims.

Other provisions of Article 8 confirm this reading of the terms of Article 8(4). Article 8(2)(a)(ii) grants an investor the right to initiate arbitration if it is unsatisfied with the decision reached by a domestic court under Article 8(1). Thus, Article 8(2) creates a right to resort to international arbitration regardless of the decision reached by domestic courts. Any interpretation of Article 8(2) that would

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11. Vienna Convention, Art. 31(1). The United States has not ratified the Vienna Convention, but "it has recognized since at least 1971 that the Convention is the 'authoritative guide' to treaty law and practice." *Ecuador v. United States of America*, PCA Case No. 2012-5, United States' Memorial on Objections to Jurisdiction, at 16 n.47 (Perm. Ct. Arb. 2012).

vest the courts of Argentina or the United Kingdom with the principal authority to determine whether an investor had complied with Article 8(1) would be inconsistent with that right.

The text of the Treaty provides no support for the conclusion that Argentina and the United Kingdom intended for courts at the site of arbitration to make *de novo* rulings on threshold questions. Article 8 does not specify arbitration in any particular jurisdiction. Rather, it provides for arbitration under the UNCITRAL Rules, which leave the choice of where to hold the arbitration to the parties, or if they cannot agree, to the arbitral tribunal.[12]

The Court of Appeals recognized that "the Treaty's incorporation of the UNCITRAL Rules provides 'clear[] and unmistakabl[e] evidence . . .' that the parties intended for the arbitrator to decide questions of arbitrability."[13] Article 21 of the

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12. UNCITRAL Arbitration Rules, Article 16(1).

13. *Republic of Argentina v. BG Group, PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (citation omitted) (Petition for a Writ of Certiorari Appendix ("Pet. App.") 14a). The Second Circuit has similarly concluded that references to UNCITRAL Rules in a BIT constitute clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitrators. *Werner Schneider,* 2012 U.S. App. LEXIS 16508, at *10; *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393-94 (2d Cir. 2011).

UNCITRAL Rules provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." The Court of Appeals nevertheless found that the UNCITRAL Rules were "not triggered until after an investor ha[d] first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."[14]

There are two fundamental flaws in the Court of Appeals' reliance upon what it called a "temporal limitation." First, the Court of Appeals' conclusion that the UNCITRAL Rules were "not triggered" was wrong as a factual matter. It was pursuant to Article 16(1) of the UNCITRAL Rules that the parties chose Washington D.C. as the place of arbitration. If the parties had chosen to hold the arbitration in another country, or even another federal circuit, the petition to vacate the award would have gone to the court in that country or circuit.[15] It was only because the UNCITRAL Rules

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14. *BG Group, PLC*, 665 F.3d. at 1371 (Pet. App. 14a).

15. 9 U.S.C. § 204; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Article V(1)(e), 21 U.S.T. 2517, 330 U.N.T.S. 3, as implemented by 9 U.S.C. § 201, et seq.

had been triggered that this case was before the Court of Appeals in the first place.

Second, the Court of Appeals' reasoning would swallow all disputes about preconditions to arbitration and require that all such disputes be decided by a court, notwithstanding decisions by this Court and other circuits to the contrary.[16] *Any* precondition to arbitration, such as an obligation to negotiate for a period of time before commencing arbitration, will by definition refer to an event or events that should have preceded the arbitration. Because disputes about such "temporal limitations" do not implicate the parties' consent to arbitrate, but only raise questions about whether the parties have followed the agreed sequencing, such disputes should be decided by the arbitral tribunal.

Amici submit that Argentina's and the United Kingdom's intention, expressed in Article 8 of the Treaty, was to have an international arbitral tribunal decide disputes between investors and states, including disagreements over whether a claimant's failure to proceed initially in domestic courts rendered its claim inadmissible.[17] This case

16. *See* Part II, below. The First, Sixth, Seventh, and Eighth Circuits have all held that the question of whether a condition precedent to arbitration has been satisfied is a question of procedural arbitrability for the arbitrators to decide. (Petition for a Writ of Certiorari ("Pet.") 28-31.)

17. Under international law, a failure to exhaust local remedies does not deprive a tribunal of jurisdiction, but raises only a

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gives the Court an opportunity to provide guidance to the lower courts about how to interpret and apply international treaties so as to vindicate the intentions of the sovereign parties that conclude them.

B. THE ARBITRAL TRIBUNAL KNEW HOW TO APPLY INTERNATIONAL LAW

The wisdom of deferring to arbitrators' determinations of disputes about preconditions to arbitration is demonstrated by the Court of Appeals' conclusion that "the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration."[18] The arbitral tribunal's decision that the claimant was not required to litigate in Argentina before commencing arbitration was in fact based squarely on the international law properly applicable to the interpretation of the Treaty. More specifically, the arbitral tribunal held that, "[a]s a matter of treaty interpretation . . . Article 8(2)(a)(i) cannot be

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procedural question as to the admissibility of the claim. *See Interhandel Case* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 24 (Mar. 21, 1959) (diplomatic espousal).

18. *BG Group, PLC*, 665 F.3d at 1366 (Pet. App. 2a).

construed as an absolute impediment to arbitration,"[19] and that "any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration."[20]

The arbitral tribunal reached this conclusion after careful consideration of the Spanish-language text of an Argentine Presidential Decree "whose purpose was to bar recourse to the courts by those whose rights were felt to be violated."[21] The tribunal concluded that:

> a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to: a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations; [and] b) insist that Claimant go to domestic courts to challenge the very same measures.[22]

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19. *BG Group Plc v. The Republic of Argentina*, Final Award (Dec. 24, 2007), at ¶¶ 146-47 (Pet. App. 165a-166a).

20. *Id.* at ¶ 147 (Pet. App. 166a).

21. *Id.* at ¶ 148 (Pet. App. 166a).

22. *Id.* at ¶ 156 (Pet. App. 170a-171a).

In reaching this result, the arbitral tribunal applied the rules of international law chosen by the parties. The Treaty specifically instructs the arbitrators in Article 8(4) to apply "applicable principles of international law," and the principles of international law applicable to the interpretation of treaties are those codified in the Vienna Convention. Both Argentina and the United Kingdom have signed and ratified that Convention,[23] and its principles of treaty interpretation reflect customary international law.[24] The conclusion the tribunal reached is in fact fully consistent with the customary international law principle that local remedies need not be pursued if "the injured person is manifestly precluded from pursuing local remedies."[25]

Other arbitral tribunals interpreting BITs have excused claimants from obligations to pursue local remedies if (1) the investment treaty contains an MFN clause, and (2) the state invoking the local remedies requirement has agreed to arbitrate

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23. The United Kingdom ratified the Vienna Convention on June 25, 1971, and Argentina ratified it on December 5, 1972.

24. *See, e.g.*, *Arbitral Award of 31 July 1989* (Guinea v. Bissau/Senegal), I.C.J. Reports 1991, at ¶ 48 (Nov. 12, 1991).

25. International Law Commission Draft Articles on Diplomatic Protection, Article 15(d) (2006), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf.

disputes with investors of a third state without imposing such a requirement.[26] Many of these awards were made in connection with claims brought against Argentina under BITs that contain local remedies requirements similar to those in the Treaty.[27] Applying an international law analysis, the tribunals in those cases have generally permitted claimants to proceed with arbitration.[28]

26. *E.g., RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arb. V 079/2005, Award on Jurisdiction, at ¶¶ 155-56 (Oct. 5, 2007).

27. *See, e.g., Hochtief Aktiengesellschaft,* ICSID Case No. ARB/07/31, at ¶ 48-99; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, at ¶¶ 79-109 (June 21, 2011); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, at ¶ 93 (June 20, 2006); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, at ¶¶ 52-66 (May 16, 2006); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction, at ¶ 28 (June 10, 2005); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, at ¶¶ 24-49 (June 17, 2005); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, at ¶¶ 104-10 (Aug. 3, 2004). *But see ICS Inspection & Control Servs. Ltd. v. The Argentine Republic*, UNCITRAL, Award on Jurisdiction (Feb. 10, 2012).

28. BG Group made this argument to the arbitral tribunal, but the arbitral tribunal never reached the question, because it had no need to do so. *BG Group, PLC*, 665 F.3d at 1368 (Pet. App. 7a); *BG Group Plc*, Final Award, at ¶ 157 (Pet. App. 171a).

However, the Court of Appeals neither considered the effect of the Treaty's MFN clause on Article 8, nor did it remand that question for determination by the arbitral tribunal.

In sum, the Vienna Convention simply cannot be regarded as an "outside legal source" in relation to disputes under the Treaty.[29] The Court of Appeals nevertheless replaced the arbitral tribunal's reasoned decision under Article 32 of the Vienna Convention—the law that the Treaty directed the arbitrators to apply—with its own analysis of the Treaty. Its failure to apply international law shows why threshold and merits questions alike are better dealt with by arbitrators.

II. ARBITRATORS ARE BEST SITUATED TO DECIDE WHETHER CONDITIONS PRECEDENT TO ARBITRATION HAVE BEEN SATISFIED

This case provides this Court an opportunity to clarify the confused state of United States law concerning the difference between substantive and procedural "arbitrability," and the importance of that distinction in delineating the roles of arbitral

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29. *Id.*

tribunals and courts in the determination of threshold issues.[30]

> In *Howsam*, the Court said:
>
> "[P]rocedural" questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator to decide. So, too, the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.[31]

The Court of Appeals' tautological observation that "[t]he 'gateway' issue in this appeal is arbitrability"[32] suggests a failure to appreciate this Court's instruction in *Howsam* that some "arbitrability" issues have a procedural character that makes them "presumptively *not* for the judge, but for an arbitrator, to decide."[33] The Court of Appeals' reasoning is at cross-purposes with this Court's admonition that "for purposes of applying the

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30. *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 28-29 (2012); *see also* (Pet. 28-31).

31. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citation and internal quotation marks omitted) (emphasis in original).

32. *BG Group, PLC*, 665 F.3d at 1369 (Pet. App. 10a).

33. *Howsam*, 537 U.S. at 84 (emphasis in original).

interpretive rule, the phrase 'question of arbitrability' has a far more limited scope."[34]

The Court of Appeals suggested that, in *Howsam*, "the question of arbitrability . . . was intertwined with the facts of the dispute, [whereas h]ere, the question of arbitrability is separate from the underlying dispute." That statement is simply incorrect.[35] But whether courts or arbitrators should rule on a procedural objection should not in any event turn on the extent to which the procedural objection is intertwined with the substantive dispute.

The key distinction that emerges from *Howsam* is whether an objection to arbitration calls into question the existence or validity of an arbitration agreement, on the one hand, or features of the arbitral process, on the other. In the former situation—which this Court has referred to as raising issues of substantive arbitrability—the threshold objection strikes at the very heart of the legitimacy of arbitration, namely the consent of the

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34. *Id.* at 83.

35. The arbitral tribunal's analysis of Article 8 of the Treaty was closely intertwined with the effects of the Argentine legislation at the heart of the claim on the merits. *BG Group Plc*, Final Award, at ¶¶ 147-57 (Pet. App. 165a-171a).

parties, and is, presumptively, for the courts to decide.[36]

In the latter situation, by contrast, the objection implicates neither the existence nor the validity of the arbitration agreement, but rather differences over when and how the arbitral process should unfold. A failure to satisfy a condition precedent is only one example of this latter category.[37] Other examples include whether: (i) a claim is time barred, as in *Howsam*;[38] (ii) a claim is barred by *res judicata*;[39] (iii) the claimant waived its

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36. *See* Bermann, *supra* note 30, at 29-30.

37. See, e.g., John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); See also Dialysis Access Center, LLC v. RMS Lifeline, Inc., 638 F.3d 367, 383 (1st Cir. 2011); Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., 623 F.3d 476, 477 (7th Cir. 2010); 3M Co. v. Amtex Sec., Inc., 542 F.3d 1193, 1200 (8th Cir. 2008); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 392 (6th Cir. 2008).

38. See, e.g., Howsam, 537 U.S. 79 (2002). See also Int'l Union of Operating Eng'rs v. Flair Builders, Inc., 406 U.S. 487, 491 (1972).

39. *See, e.g.*, *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1109-10 (10th Cir. 2009); *Emilio v. Sprint Spectrum, L.P.*, 315 F. App'x 322, 324 (2d Cir. 2009); *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005). *But see FleetBoston Fin. Corp. v. Alt*, No. 10-1035, 2011 U.S. App. LEXIS 5853, at *4 (1st Cir. Mar. 23, 2011).

right to arbitrate;[40] or (iv) the parties did not agree to class arbitration.[41] Deferring to arbitrators' determinations of these types of objections helps ensure the efficiency of arbitral proceedings, without detriment to their legitimacy.[42]

The Court would do a signal service to all those engaged in international arbitration if it were to grant the Petition and use this opportunity to underscore the importance of the distinction between substantive and procedural arbitrability in delineating the proper roles of courts and arbitrators in the resolution of threshold issues.

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40. *See, e.g.*, *Republic of Ecuador*, 638 F.3d at 393-94; *ProTech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871-72 (8th Cir. 2004); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109-10 (11th Cir. 2004).

41. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-54 (2003) (plurality opinion).

42. *See* Bermann, *supra* note 30, at 40-47.

CONCLUSION

For all of the above reasons, the Court should grant the Petition for a Writ of Certiorari.

August 29, 2012

Respectfully submitted,

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APPENDIX

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The Agreement was previously
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ARGENTINA

Treaty Series No. 41 (1993)

Agreement

between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina

for the Promotion and Protection of Investments

London, 11 December 1990

[The Agreement entered into force on 19 February 1993]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
July 1993

LONDON : HMSO

£3-55 net

Appendix A

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF ARGENTINA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;

Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1
Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

(b) "returns" means the amounts yielded by an investment and in particular, though not

exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "investor" means:

(i) in respect of the United Kingdom:

(aa) natural persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; and

(bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the Republic of Argentina:

(aa) any natural person, who is a national of the Republic of Argentina in accordance with its laws on nationality; and

(bb) any legal person constituted according to the laws and regulations of the Republic of Argentina or having its seat in the territory of the Republic of Argentina;

Appendix A

(d) "territory" means the territory of the United Kingdom of Great Britain and Northern Ireland or of the Republic of Argentina, as well as the territorial sea and any maritime area situated beyond the territorial sea of the State concerned which has been or might in the future be designated under the national law of the State concerned in accordance with international law as an area within which the State concerned may exercise rights with regard to the sea-bed and subsoil and the natural resources; and any territory to which this Agreement may be extended in accordance with the provisions of Article 12.

ARTICLE 2

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each

Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

ARTICLE 4

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards

restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns to the country where they reside.

(2) Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed between the investor and the Contracting Party in whose territory the investment was made and in accordance with the procedures established by that Contracting Party. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

(3) Each Contracting Party shall have the right in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws and procedures to limit the free transfer of investments and returns. Such

limitations shall not exceed a period of eighteen months in respect of each application to transfer and shall allow the transfer to be made in instalments within that period but the transfer of at least fifty per cent of the capital and of the returns shall be permitted by the end of the first year. In no circumstances may such limitations be imposed on the same investor after a period of three years from the start of the first such limitation. Pending the transfer of his capital and returns, the investor shall have the opportunity to invest them in a manner which will preserve their real value until the transfer occurs.

(4) Notwithstanding the provisions of paragraph (3) of this Article, each Contracting Party shall, in any event, guarantee to the investors of the other Contracting Party, the unrestricted transfer of dividends, which have been distributed to shareholders and paid out of the export earnings of the company concerned.

ARTICLE 7

Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from

Appendix A

(a) any existing or future customs union, regional economic integration agreement or similar international agreement to which either of the Contracting Parties is or may become a party, or

(b) the bilateral agreements providing for concessional financing concluded by the Republic of Argentina with Italy on 10 December 1987 and with Spain on 3 June 1988 respectively, or

(c) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8

Settlement of Disputes
Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965[43] (provided that both Contracting Parties are Parties to

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[43]. Treaty Series No. 25 (1967), Cmnd. 3255.

the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original

investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

ARTICLE 9

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if, possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not

been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall in principle be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

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ARTICLE 10

Subrogation

(1) If one Contracting Party or its designated Agency makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated Agency by law or by legal transaction of all the rights and claims of the Party indemnified and that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the Party indemnified.

(2) The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the Party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received in non-convertible currency by the former Contracting Party or its designated Agency in pursuance of the rights and claims acquired shall be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

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ARTICLE 11

Application of other Rules

If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement or if any agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

ARTICLE 12

Territorial Extension

At the time of the entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible, as may be agreed between the Contracting Parties in an Exchange of Notes.

ARTICLE 13

Entry into Force

Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter

into force on the date of the later of the two notifications.

ARTICLE 14

Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of fifteen years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in two originals at London this 11th day of December 1990 in the English and Spanish languages, both texts being equally authoritative.

For the Government of the United Kingdom of Great Britain and Northern Ireland:	For the Government of the Republic of Argentina:
DOUGLAS HURD	D. CAVALLO